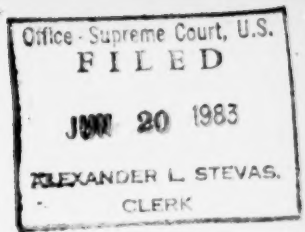


82-2093



NO.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JAMES ALLEN BUDDE,
PLAINTIFF

VS.

KENTRON HAWAII, LTD., ET AL
DEFENDANTS

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

NO. 81-1225

PETITION FOR CERTIORARI

EDMOND R. EBERLE
COUNSEL OF RECORD
FOR PLAINTIFF
514 K & B PLAZA
1055 ST. CHARLES AVE.
NEW ORLEANS, LOUISIANA
70130
504-522-0552

NO.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JAMES ALLEN BUDDE,
PLAINTIFF

VS.

KENTRON HAWAII, LTD., ET AL
DEFENDANTS

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

NO: 81-1225

PETITION FOR WRIT OF CERTIORARI

Plaintiff James Allen Budde petitions the Court for a writ of certiorari to review the judgment of the Court of Appeals, Tenth Circuit, dated March 21, 1983.

QUESTIONS PRESENTED FOR REVIEW

- I. Whether the Court of Appeals was correct in applying Colorado state law to the facts of this foreign accident or should have applied the law of the Republic of South Vietnam, the site of the accident.
- II. Whether the Court of Appeals judgment in approving a directed verdict for defendants of this jury trial unlawfully deprived plaintiff of a jury trial, particularly in light of the foreign law that should have been applied.

III. Whether the Court of Appeals judgment, in holding that plaintiff had not presented a prima facie case of negligence failed to consider all evidence submitted by plaintiff and failed to hold that the burden of going forward with the evidence had shifted to defendant.

PARTIES TO THIS PROCEEDING

Plaintiff - James Allen Budde

Defendant - Kentron Hawaii, Ltd.

TABLE OF CONTENTS

	PAGE
OFFICIAL REPORT	5
CONCISE STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED	6
CONCISE STATEMENT OF THE CASE	7
ARGUMENT I	15
ARGUMENT II	32
ARGUMENT III	38
APPENDIX	43

TABLE OF CASES, STATUTES AND AUTHORITIES

CASES	PAGE
Black, Sivalls and Bryson, Inc. v. Keystone Steel Fabricator, C.A. Okla 1978, 584 F.2d 946.	38
Bryan V. Merrill, Lynch, Pierce, Fenner & Smith, A.N.C. 1977, 565 F.2d 276	38
Dworak v. Holson Construction Co. 551 P.2d 198	25
Fort Collins V. Rostek 514 P.2d 324	21
Hale v. Holy Cross Hospital, 513 F. 2d 315	38
Hidalgo Properties, Inc. v. Wachovia Mortgage Co., 617 F.2d 196, 198	38
King v. Ford Motor Co., C.A. Ala. 1979 597 F.2d 436	38
Lupton v. Torbey C.A. Kan 1977, 548 F.2d 316	38
Miller v. Baum, C.A. Tex. 1968, 400 F.2d 176	38
Palmer v. Ford Motor Co. C.A. Kan 1974, 498 F.2d 952	38
Pust v. Union Supply Co. 561 P. 2d 355	25
Sabbel v. Pacific Intermountain Express Co. 536 P. 2d 1160	25
Seganish v. District of Columbia, 408 F.2d 653	35

CASE	PAGE
Shore v. Parklane Hoisery Co, Inc. C.A. N.Y. 1977, 565 F.2d 176	38
Thiele v. State, 30 Colo. App. 491, 495 P.2d 558,561	34
Uniform Oil Co. v. Phillips Petroleum Co. Mont. 1968, 400 F.2d 267	38
Wilkins v. Hogan, 1970, 425 F.2d 1022	38
Yeager v. Lathrop, 28 Colo. App. 44, 470 P.2d 609,611	34

STATUTES	PAGE
U. S. Constitution, Seventh Amendment	38
Federal Rules of Evidence	19
Federal Rule of Civil Procedure	38

AUTHORITIES

Restatement (Second) Conflict of Laws	20
Denver Law Journal 51 D.L.J. 567	25

OFFICIAL REPORT

The official report of the opinion
of the Court of Appeals, Tenth Circuit is
not known.

GROUND'S OF WHICH JURISDICTION
OF THIS SUPREME COURT IS INVOKED

This is plaintiff's petition for writ of certiorari to review the judgment of the Court of Appeal for the Tenth Circuit dated and entered March 21, 1983 which affirmed the Trial Court's refusal to submit plaintiff's case to the jury by granting defendant's motion for directed verdict.

Plaintiff sought rehearing of said judgment and on May 20, 1983 the Court of Appeals denied a rehearing.

The statutory provision that confers jurisdiction on this Supreme Court to review the judgment by writ of certiorari is Title 28, Section 1254 of the United States Code.

STATEMENT OF THE CASE

On September 27, 1970, James Allen Budde, an American citizen, was in South Vietnam in the employ of the U.S. Corporation named Dynalectron. His work was that of an aircraft mechanic servicing U.S. Navy aircraft under a contract with the government.

On this date and while a passenger in a jeep, Budde, age 25, received severe brain injuries in a 'one car' accident when the jeep overturned. After emergency medical care Budde was returned to the United States and eventually to his home in New Orleans, Louisiana.

Due to his injuries Budde has no recollection of the accident whatsoever- does not know who was operating the jeep or any of the details. For many months he was unable to speak and faced a long

convalescence including speech therapy and other relearning tasks.

Until September 22, 1971, all efforts to learn the identity of the jeep operator's employer were to no avail. On that date Budde obtained a military accident report which indicated that the operator of the jeep was J.B. Francis of Kentron Hawaii, Ltd. It was not until many months had elapsed that Budde was able to locate such an unknown company. This company was finally determined to have an address in Honolulu, Hawaii. This company, like Dynalectron, was a military contractor in Vietnam with the U.S. Government.

However, when contacted, Kentron disputed the occurrence of an accident involving any of its employees and Budde. To compound Budde's difficulties, the whereabouts of J.B. Francis have never been located and correspondingly, information has not been available to him.

Subsequent investigation has established without a doubt that the jeep was in fact operated by J. B. Francis, an employee of Kentron Hawaii, Ltd., and that he remained on Kentron's payroll until some ten months after the accident. However, at no time did Kentron investigate the accident or obtain a statement from Francis.

On September 27, 1972, plaintiff filed suit against Ling-Temco-Vought, Inc., d/b/a Kentron Hawaii, Ltd. and its insurer, Insurance Company of North America, in Federal Court in New Orleans.

Defense motions therein contended that the one-year Louisiana Statute of limitations had expired when suit was brought and hence urged its dismissal. Authorities requiring Federal Courts to adopt the limitations period of the forum (Louisiana) in diversity cases were cited.

As a result, on March 11, 1974, the

District Court upheld the above defense contentions and dismissed plaintiff's suit. This was appealed to the U.S. Fifth Circuit Court of Appeals and docketed as No. 74-1726. On September 11, 1974, the Fifth Circuit affirmed the Trial Court and the decision is now final.

It was only due to the above defense assertions in the Louisiana District Court that plaintiff sought to protect his rights by litigating elsewhere. This led to the filing of identical suits in the U.S. District Court for the Northern District of Florida, Tallahassee Division, Civil Action No. 73-131, and in the U.S. District Court for the District of New Mexico, No. 10-263. In both such courts defense motions attacking the court's personal jurisdiction were filed. In the New Mexico proceedings, the defense objections to the personal jurisdiction of the court were upheld and the

District Court's decision affirmed by the Tenth Circuit Court of Appeals in proceedings No. 74-1146. Upon learning that defendants, Kentron Hawaii, Ltd. and Insurance Company of North America (since dismissed as a defendant), were registered to do business and were in fact doing business in the State of Colorado, plaintiff filed the instant suit in the Colorado U.S. District Court based upon diversity jurisdiction. Although dismissed by the District Court for lack of jurisdiction, Budde's suit was revived by the Tenth Circuit Court of Appeal by judgment dated October 31, 1977 reported in 565 F.2d 1145 wherein said appellate court reversed the district court.

Upon learning of the above action of the Court of Appeal, the Florida district court dismissed the Florida proceeding.

Subsequent to returning to the district court, this case developed as follows:

Intervention by Dynalectron's compensation insurer, Argonaut Insurance Company, for subrogation of its claim for \$37,000.00 benefits paid employee Budde;

Budde's motion for change in venue to New Orleans in view of all witnesses residing there was denied;

Case set for trial September 10, 1979;

Kentron's request for protective orders including transportation costs of its counsel to attend New Orleans depositions granted;

Budde's notice of intent to raise issue concerning foreign law, to-wit, Vietnam law, memorandum filed;

Motion of Kentron for determination of law;

Trial dates vacated and case reassigned to new judge;

Order regarding applicable law;

Budde's motion to reconsider such order, memorandum filed, denied;

Budde's request for court to certify question of applicable law for appeal denied;

Budde's complaint amended to include a claim of negligent entrustment;

Case set for trial February 2, 1981;

Kentron's motion for summary judgment, Budde's opposition thereto and his motion for summary judgment, both denied;

Pre-trial hearing on admissibility of military police report, and attached handwritten statement of the employee, J.B. Francis; Department of Labor's employer's first report of accident filed by Budde's employer, Dynalectron; court orders same will not be admitted;

Jury trial held on liability issue only; damage issue bifurcated;

Kentron's motion for directed verdict at conclusion of Budde's case granted, jury does not get to consider Budde's claim and his suit dismissed.

Plaintiff appealed to the United States Court of Appeals, Tenth Circuit, and by decision dated March 21, 1983 the Court of Appeals affirmed the district court's judgment. Plaintiff's application to the Court of Appeal for rehearing was denied May 20, 1983.

ARGUMENT I

Rule 17 of this Court indicates that a review on writ of certiorari will be granted only when there are special and important reasons therefor. Among the character of reasons that the Court will consider is when a federal court of appeal has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Court's power of supervision.

The saga of this case extends over some thirteen years, from a military jeep accident on September 27, 1970 in South Vietnam where U.S. forces were fighting, through the date of this petition, wherein plaintiff urges this court of last resort to preserve his right to jury trial and to correct the numerous errors made by the district court and compounded by the Court of Appeals.

Within the space limitations of a petition for certiorari, it is difficult to highlight the most salient errors in such a complex case as the instant one. Perhaps the most glaring error involved the determination of the law to govern the factual issues of this case. The legal issues included:

- (1) What law governs the many issues of this case? Was it the law of the Republic of South Vietnam where the accident and injury occurred? Was it the law of the legal domicile of defendant, Kentron Hawaii, Ltd., State of Hawaii? Was it the law of the forum, the State of Colorado where suit was filed? Was it the law of the State of California where defendant entered its employment contract with its employee, J.B. Francis, the tortfeasor? Were the Federal Rules of Evidence applicable?

(2) Was one law to govern all aspects of this case, i.e., was the law of South Vietnam to apply to the issue of negligence in the operation of the jeep? Was the same law to apply to the issue of respondeat superior of the employer, Kentron Hawaii, Ltd., for acts of its employee, J.B. Francis? Was the law of South Vietnam to apply to burden of proof and burden of going forward with the evidence?

(3) Or, were the laws of different countries and/or states to govern different issues of this case?

The determination of 'what law governs' in the many issues of this case was considered by both plaintiff and defendant as most important and so crucial as to possibly affect the outcome of the case. Realizing the complexity of this matter, both

litigants prior to trial moved the trial court to determine applicable law. The trial court did, at least, grasp this question and issued its order which plaintiff has consistently considered erroneous. Plaintiff urged the trial court to certify the question to the Court of Appeals - prior to trial - but to no avail.

The case proceeded to trial with bifurcated liability and damage portions. As the trial court did not feel that the plaintiff had presented sufficient evidence to warrant submission to the jury, plaintiff's case, and his efforts to have a jury determine defendant's liability - was dismissed.

Despite the challenge to the trial court's order relative to applicable law, the thorough briefing of the applicable law by plaintiff and defendant, and despite plaintiff's petition for rehearing noting this omission from its opinion, the Court of Appeal failed to consider this

question of applicable law. It was completely ignored.

The district court's order of March 21, 1980 relative to the determination of applicable law was multifarious. The court ruled:

- (1) The law of South Vietnam will govern whether the conduct of either Plaintiff or Defendant Francis was negligent,
- (2) The Federal Rules of Evidence will govern evidentiary matter,
- (3) The law of the State of Hawaii will govern KHL's (Kentron's) vicarious liability for the torts of its employee,
- (4) The law of the State of Colorado will govern issues relating to the proof and presumptions.

Being of the opinion that the question of applicable law was a complex one involving Colorado conflict of laws, substantive law of the Republic Law of South Vietnam, and with the court's ruling, Hawaiian law, Budde sought to have the district court certify this question for appeal. However, this request was denied by the district court.

It must also be noted at this time that subsequent to the court's order on applicable law Budde amended his complaint to allege an additional cause of action against Kentron, that is, negligent entrustment of the jeep in question. No formal order of the court was made in reference to the issue of negligent entrustment, however, the court did verbally indicate that the law of South Vietnam would apply.

It is submitted that the order of court dated April 25, 1980 is erroneous in its decision of applying the law of the State of Hawaii relative to the vicarious liability of Kentron for torts of its employee J. B. Francis and is erroneous in its decision to apply the law of the State of Colorado relative to issues relating to burden of proof and presumptions. It is Budde's contentions that the laws of the Republic of South Vietnam

should control both of these issues. In addition, such foreign law should also control, it is submitted, the question of negligent entrustment. However, it is the position of Budde in this matter that not only was the court's order erroneous, but also that when the court was considering Kentron's motion for directed verdict it did not apply the laws which it earlier had ruled applicable.

This being a diversity case under the Erie doctrine, the conflict of laws of the forum, Colorado must be considered to determine the applicable law.

In the 1973 Supreme Court of Colorado in *Fort Collins v. Rostek*, 514 P. 2nd 314 adopted the "significant relationship" of the Restatement, Conflict of Laws and Stated:

"We announce that Colorado would adopt the general rule of applying the law of the state with the 'most significant' relationship with the occurrence and the parties as presented and defined in the Restatement, (Second) Conflict of Laws, Vol.1, Sec. 145 (1969)."

A reference to section 145 discloses that it refers to Section 6 "Choice-of-Law Principles." These sections are reproduced below:

Section 145. The General Principle

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles state in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.

The contracts are to be evaluated according to their relative importance with respect to the particular issue.

Section 6. Choice-of-Law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include,

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative

interests of those states in the determination of the particular issue,

- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

Under B. Particular Torts Section 146 of the Restatement says:

Section 146. Personal Injuries

In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Other pertinent provisions of the Restatement are:

Section 156. Tortious Character of Conduct

(1) The law selected by application of the rule of § 145 determines whether the actor's conduct was tortious.

Section 157. Standard of Care

(1) The law selected by application of the rule of § 145 determines the standard of care by which the actor's conduct shall be judged.

(2) The applicable law will usually be the local law of the state where the injury occurred.

Section 158. Interest Entitled to Legal Protection

(1) The law selected by application of the rule of § 145 determines whether the interest affected is entitled to legal protection.

(2) The applicable law will usually be the local law of the state where the injury occurred.

Section 159. Duty Owed Plaintiff

(1) The law selected by application of the rule of § 145 determines whether the actor owed a duty to the injured person and whether this duty was violated.

(2) The applicable law will usually be the local law of the state where the injury occurred.

Section 160. Legal Cause

(1) The law selected by application of the rule of § 145 determines an act or omission is the legal cause of an injury.

(2) The applicable law will usually be the local law of the state where the injury occurred.

Section 161. Defenses

The law selected by application of the rule of § 145 determines what defenses to the plaintiff's claim may be raised on the merits.

Section 162. Specific Condition of Liability

(1) The law selected by application of

the rule of § 145 determines whether the doing of an act or the happening of an event must precede the creation of liability.

(2) The applicable law will usually be the local law of the state where the injury occurred.

Section 171. Damages

The law selected by application of the rule of § 145 determines the measure of damages.

Section 174. Vicarious Liability

The law selected by application of the rule of § 145 determines whether one person is liable for the tort of another person.

Subsequent Colorado decisions were Sabel v. Pacific Intermountain Express Co. 536 P.2d 1160 (Colorado Court of Appeal, 1975), Dworak v. Holson Construction Company 551 P.2d 198 (1976, Supreme Court of Colorado), Pust v. Union Supply Company, 561 P.2d 355 (1977) and 51 Denver Law Journal 567 entitled "Heads; Lex Loci Dleicti; Tails; Lex Loci Domicil - The Conflict of Laws Coin on Edge"

Considering the above Colorado law the only conclusion that can be reached is that there are no "significant contacts" in this

matter other than the Republic of South Vietnam. There are absolutely no "contacts" with any other state to justify the imposition of any other law to this case.

The fallacy of the district court's reasoning in reaching its decision relative to applicable law consisted of the failure of the court to appreciate the factual background of this case. This factual background included a contract between Kentron and the United States Government to provide certain calibration and electronic services to the U.S. Army in Vietnam. This work contemplated the use of vehicles to perform the work which were to be supplied by the U.S. Army to Kentron personnel. Kentron, in turn, contracted with its employee J.B. Francis in the United States to work for Kentron under this government contract for one year in Vietnam. As specified in the contract, Kentron had complete control over its employee in determining where the employee might work in the whole country of Vietnam, the days and

hours that he worked, and his complete availability to call on a twenty-four hour day, three hundred and sixty-five day year.

Included in the obligations of the employee in his contract with Kentron was to comply with all the laws of the Republic of South Vietnam including its traffic regulations and other laws.

Perhaps the most glaring error made by the district court in its decision regarding applicable law is the holding that the law of the State of Hawaii would govern Kentron's vicarious liability for the torts of its employee, J.B. Francis. This feature of this case, that it, the employer's responsibility for torts of its employee, is a most significant one and of necessity one that requires penetrating consideration. Particularly is this true when the determination of such law controls how the district court should consider the motion for directed verdict. Obviously, as the court ruled, the court should have

considered the motion for directed verdict in light of the law of the State of Hawaii relative to vicarious liability. Budde submits that the district court did not do this, and of more importance, the law that should have been applied was the law of the Republic of South Vietnam rather than the law of the State of Hawaii.

The sole basis of the court's decision to apply the law of the State of Hawaii is the court's declaration , "Hawaii is the State where the relationship between employer and employee is centered and is the place of incorporation of KHL (Kentron)."

As is set forth above the only connection of the State of Hawaii with this case is that it was the site of incorporation of Kentron's worldwide activities. Contrasted to this, are the indisputable facts that the contract Kentron entered into with Francis was entered into in the continental United States. The actual work involved in the contract was to be performed in

Vietnam and was performed in Vietnam. In addition, the incident which is the basis of this lawsuit occurred in Vietnam while J.B. Francis was operating a military vehicle obtained by him pursuant to the terms of Kentron's contract with the United States Government. How the court reasoned that under such facts the State of Hawaii was the state with the most "significant relationship" escapes the writer.

It is submitted that the district court erroneously interpreted the law of the State of Colorado, its adoption of the Restatement of Conflict of Laws and its interpretation of the clear mandate of the Restatement, Section 174 dealing with vicarious liability.

The court's reliance on Section 6 (2) (b) which cites, "the protection of justified expectation" has nothing to do with a negligence or tort case. This is made clear in the "comment" in the Restatement on page 15 that says "...the parties (victim and tortfeasor) have no justified

expectations to protect, and this factor can play no part in the decision of the choice of law question."

Budde submits that the law of the Republic of South Vietnam should govern all liability of Kentron, either direct negligence, to-wit, under Budde's claim of negligent entrustment, or under the doctrine of respondeat superior. However, and it is submitted more logical and more correct, the law of the Republic of South Vietnam should govern all liability of Kentron under such law and its Civil Code. This should not be limited to concepts of liability under the laws of Hawaii, Colorado or other states. Consequently, it is apparent that the district court did not consider the correct applicable law when it ruled on the motion for directed verdict.

Examination of the opinion of the Court of Appeals fails to reveal even a mentioning of applicable law! Were not the location of the accident stated, one could easily assume that the accident happened in

downtown Denver, Colorado (the forum state). The opinion is bereft of any consideration of foreign law (both sides had retained Vietnam legal experts whose reports were submitted to the district court). Thus the rulings of the district court on this vital area of the case were not subjected to appellate review! Certainly this Court should scrutinize the validity of such rulings.

ARGUMENT II

Of momentous importance to plaintiff was the problems he admittedly had relative to proving his case. With the jeep operator's whereabouts unknown (although retained on Kentron's payroll for ten months following the accident) and with his own memory obliterated by brain damage, plaintiff's proof of the accident was limited to a copy of the military police report of the one-car accident; the accompanying handwritten statement of the jeep driver, J.B. Francis; the Department of Labor's first report of injury filed by plaintiff's employer; the answers of defendant to various interrogatories; and the deposition of defendant's superior or boss of J.B. Francis.

A reference to military police report reveals that it contains the usual accident information, to-wit, date, time, location, parties involved, vehicles involved, etc. However, attached with the police report is a handwritten statement of J.B. Francis

giving his account of the accident which statement is reproduced below:

"It was just starting to sprinkle. We were enroute toward Cam Ranh Bay driving approximately 30 MPH and passed a slow moving vehicle. While returning to our proper lane we started to skid due to a slick spot on the black top. I turned into the skid and at that moment the left front wheel on the jeep either locked or collapsed thus making the jeep roll. Something must have hit me in the head because I remember nothing more until about 8:30 p.m. in the 12th field hospital. Upon learning about noon Monday that the remains of the jeep had been left on the highway I procured a wrecker from the 136th Light Maintenance Co. and went after the jeep. Upon arrival at the scene of the accident we discovered the jeep had been stolen. We searched the area without any luck. Some of the enlisted people in the 128th were coming from Nha Trang about 4 p.m. Monday and reported they saw the ROK's with it in a small town near Nha Trang.

(signed)

J.B. Francis

The rulings of the trial court in refusing to allow introduction of the police report, the handwritten statement of the jeep driver; the Department of Labor's report and in severely restricting the use of the interrogatories were clearly erroneous as pointed out to the Court of Appeal.

However, on this issue also, the Court of Appeal failed to address this issue (see page 9 of its decision) and proceeds into a speculative discussion of what such evidence would prove if it had been admitted.

The appellate opinion then decides plaintiff's thirteen year old cause of action for injury and disability by citing two Colorado State court decisions, Yeager v. Lathrop, 28 Colo. App. 44, 470 P. 2d 609, 611 (Colo. Ct. App. 1970) and Thiele v. State 30 Colo. App. 491, 495 P. 2d 558 (Colo. Ct. App. 1972) the former relates to burden of proof and the later was cited for the principle that an accident occurred alone is not enough to establish negligence.

For the Appeals Court to dispose of plaintiff's Vietnam incurred injury in such a cursory manner and using Colorado jurisprudence to do it is obviously erroneous and deserving of review by this Court.

The Court of Appeals' opinion while

adopting the driver's statement from the police report, erroneously concludes

"nothing else is shown" (page 5). The opinion says:

"In our view, it is not possible to infer negligence from these facts. There is simply no basis for concluding that Francis was or was not negligent."

This conclusion by the appellate court:

- (1) Ignores defendant's answer to plaintiff's interrogatory No. 66:

"As reported to you from all sources, how did the accident of September 27, 1970 occur, furnishing sources of such information?"

Answer.

Jesse B. Francis reported verbally that while he was returning to Cam Ranh Bay from Nha Trang with a passenger, he ran off the road and turned over.

- (2) Ignores the deposition testimony of John Griffiths, the supervisor of J.B. Francis:

"He said he had an accident the previous Sunday involving a jeep on a road between Nha Trang and Cam Rahn Bay. He said that the jeep turned over and that the passenger was injured and he obviously was because he had some bruises, and that was all." (Page 50-51, deposition of John Griffiths, Volume VIII, Plaintiff Exhibit 9).

- (3) Ignores the Department of Labor's Report:

"Passenger in jeep enroute (appro 3600 hrs.) from Nha Trang to Cam Rahn Bay, Vietnam during light rain. Driver (J.B. Francis, age 38, Kentron Hawaii, Ltd. Employee c/o 128 Signal Co., APO S.F. 96312) while returning to proper lane of traffic after passing a slower moving vehicle, skidded on a slick spot on the black top, were thrown from vehicle."

- (4) Is illogical in failing to consider the self-serving nature of the driver's own account of this one vehicle accident, and,
- (5) Fails to consider whether plaintiff or defendant, has the burden of going forward with the evidence (to be distinguished from the burden of proof) after plaintiff has established that he was injured when a passenger in a jeep that overturned with no other vehicle involved.
(Query: Is it the injured passenger or the vehicle operator who must now exonerate or expunge himself from the presumption of negligence to which these circumstances imply and to which the doctrine of *res ipsa loquitur* applies?)
- (6) Rules on this case by citing Colorado state law on burden of proof while choosing to ignore the complex conflict of laws questions, including the applicability of Article 763 of the Civil Code of the Republic of South Vietnam which provides:

"A person is responsible not only for the damage he causes by his personal acts, but also for the damage caused by the acts of persons for whom he is answerable and by things which are under his custody."

ARGUMENT III

The procedural device used to circumvent plaintiff's Seventh Amendment's constitutional right to a jury trial was Rule 50 of the Federal Rules of Civil Procedure providing for a motion for a directed verdict. The Court of Appeals opinion states:

" The propriety of the directed verdict must be tested by federal law. Lupton v. Torbey, 548 F.2d 316 (10th Cir. 1977). Under federal law, a verdict may not be directed unless "all the inferences to be drawn from the evidence are so patently in favor of the moving party that reasonable men could not differ as to the conclusions to be drawn therefrom." Hidalgo Properties, Inc. v. Wachovia Mort. Co., 617 F.2d 196, 198 (10th Cir. 1980). Further, "(a)ll such evidence and the inferences in this regard must be construed in the light most favorable to the party against whom the motion is directed." Id. (citing Wilkins v. Hogan, 425 F.2d 1022 (10th Cir. 1970).

It is plaintiff's contention that the jury being the trier of fact, should have been the one to determine the fate of plaintiff's complaint against defendant rather than the district court or the Court of Appeals.

Reasonable inferences from the submitted evidence would establish the liability of the jeep driver. Reasonable inferences would

establish the presumption of negligence created by this overturning jeep in the one-car accident. Procedural laws would require defendant, rather than plaintiff, to go forward with the evidence, i.e., produce driver Francis to exonerate himself from the presumption of negligence. And, of utmost significance, the applicable law would determine these issues.

CONCLUSION

It is submitted that the failure of the Court of Appeals to address the governing law issue, as complex as it is, failed to provide the necessary criterons to apply when considering liability of the jeep driver, liability of his employer, (both under respondeat superior and negligent entrustment) admission of evidence, degree of proof to overcome a motion for directed verdict, burden of proof, burden going forward with the evidence, etc. This is a one vehicle accident in the Republic of South Vietnam wherein a jeep operated by an American employee of an American corporation overturns, severely

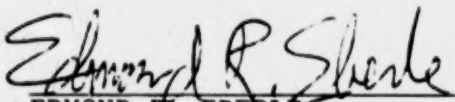
injuring his American passenger, an employee of another American Corporation.

It is plaintiff's position that the law of South Vietnam governs all aspects of this case. The Court of Appeals opinion, in ignoring the complex applicable law issue, erroneously and simplistically decided this most complex case by resorting to whether plaintiff had established a prima facie case of negligence (page 2); that it was not possible to infer negligence from the facts (page 6); that there was simply no basis for concluding that Francis was or was not negligent; and proof that an accident occurred alone is not enough to establish negligence (page 6).

This fundamental and basic common law approach to resolve this case is unwarranted and erroneous and causes plaintiff to retortically ask, whose law is to determine whether plaintiff has established a prima facie case? Whose law is to determine possible inferences of negligence? Whose law is to determine what actions or inactions

were negligence? Whose law is to determine the liability of an employer to a third person injured due to an employee's actions? And whose law is to determine the duty owed to an injured third person by the operator and/or custodian of the vehicle? These are the issues demanding appellate ruling which remain unresolved and even unmentioned!

RESPECTFULLY SUBMITTED

A handwritten signature in dark ink, appearing to read "Edmond R. Eberle", is written over the typed name.

EDMOND R. EBERLE
ATTORNEY FOR
JAMES ALLEN BUDDE
PLAINTIFF
514 K & B PLAZA
1055 ST. CHARLES AVENUE
NEW ORLEANS, LOUISISANA
70130
(504) 522-0552

PROOF OF SERVICE

I hereby certify that a copy of the foregoing petition for certiorari has been served on opposing counsel by depositing same in the United States Mail with first class postage prepaid, this 20th day of June, 1983, addressed to:

Raymond J. Connell, Esq.
2001 Energy Center One
Denver, CO 80202


EDMOND R. EBERLE